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5 UNITED STATES DISTRICT COURT
6 EASTERN DISTRICT OF WASHINGTON

7 UNITED STATES OF AMERICA,)
8 Respondent,) NO. CR-04-0138-LRS
9 -vs-) (CV-07-0300-LRS)
10 ORDER DENYING 28 U.S.C.
11 RAFAEL MARTINEZ,) §2255 MOTION
12 Petitioner.)
_____)

13 Before the Court is Petitioner's 28 U.S.C. § 2255 Motion to
14 Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody,
15 filed September 21, 2007 (Ct. Rec. 138, CR-04-0138-LRS, Ct. Rec. 1,
16 CV-07-0300-LRS). The Motion is submitted by Rafael Martinez, who is
17 appearing *pro se* for the purpose of these proceedings. Mr. Martinez
18 filed a motion for appointment of counsel, which was denied on March
19 28, 2007 (Ct. Rec. 134). Mr. Martinez filed a motion for
20 reconsideration of the order denying appointment of counsel, which was
21 also denied on July 11, 2007 (Ct. Rec. 137).
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23 **I. BACKGROUND**

24 Mr. Rafael Martinez was indicted on July 8, 2004 for Conspiracy
25 to Distribute 50 Grams or More of Actual Methamphetamine, specifically
26 56.1 grams in violation of 21 U.S.C. §841(a)(1) and 21 U.S.C. §846;

1 and Distribution of 50 Grams or More of Actual Methamphetamine,
2 specifically 56.1 grams, in violation of 21 U.S.C. §841(a)(1). Mr.
3 Martinez pled guilty to Count Two of the Indictment on March 4, 2005,
4 with a written Rule 11(c)(1)(C)) plea agreement. On August 3, 2005,
5 counsel for Mr. Martinez filed a motion to withdraw plea of guilty.
6 Ct. Rec. 79. A hearing was held on August 17, 2005 and Martinez's
7 motion to withdraw guilty plea was denied and sentencing was re-set.
8 On September 7, 2005, Mr. Martinez was sentenced to a 180-month term
9 of imprisonment with five years supervised release; and a special
10 assessment of \$100. Mr. Martinez filed a direct appeal of his
11 judgment and sentence on September 15, 2005. On October 30, 2005 Lana
12 Cece Glenn was appointed to represent Mr. Martinez. The United States
13 Court of Appeals for the Ninth Circuit affirmed the judgment of the
14 District Court on October 30, 2006. Ct. Rec. 131. Mr. Martinez
15 contends that his sentence is unconstitutional based on essentially
16 one ground: ineffective assistance of counsel. Ct. Rec. 138, at 5.

18 II. DISCUSSION

19 28 U.S.C. § 2255 provides, in part:

20 A prisoner in custody under sentence of a court
21 established by Act of Congress claiming the right
22 to be released upon the ground that the sentence
23 was imposed in violation of the Constitution or
24 laws of the United States, or that the court was
25 without jurisdiction to impose such sentence, or
26 that the sentence was in excess of the maximum
authorized by law, or is otherwise subject to
collateral attack, may move the court which
imposed the sentence to vacate, set aside or
correct the sentence.

1 A petitioner is entitled to an evidentiary hearing on the motion
2 to vacate his sentence under 28 U.S.C. § 2255, unless the motions and
3 the files and records of the case conclusively show that the prisoner
4 is entitled to no relief. This inquiry necessitates a twofold
5 analysis: (1) whether the petitioner's allegations specifically
6 delineate the factual basis of his claim; and, (2) even where the
7 allegations are specific, whether the records, files and affidavits
8 are conclusive against the petitioner. *United States v. Taylor*, 648
9 F.2d 565, 573 (9th Cir.), cert. denied, 454 U.S. 866 (1981) (internal
10 quotations, citations and footnote omitted).

11
12 This Court has carefully reviewed the record and, for the reasons
13 set forth more fully below, concludes Petitioner is not entitled to an
14 evidentiary hearing. A habeas corpus petitioner is entitled to an
15 evidentiary hearing in federal court if he alleges facts which, if
16 proven, would entitle him to habeas corpus relief. *Smith v.*
17 *Singletary*, 170 F.3d 1051, 1053-54 (11th Cir. 1999) (citation
18 omitted); *Cave v. Singletary*, 971 F.2d 1513, 1516 (11th Cir. 1992)
19 (citing *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770
20 (1963)). Here, the pertinent facts of the case are fully developed in
21 the record before the Court. *Smith*, 170 F.3d at 1054 (stating that a
22 district court does not need to conduct an evidentiary hearing "if it
23 can be conclusively determined from the record that the petitioner was
24 not denied effective assistance of counsel"). No evidentiary
25 proceedings are required in this Court. *High v. Head*, 209 F.3d 1257,
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1 1263 (11th Cir. 2000) (citing *McCleskey v. Zant*, 499 U.S. 467, 494,
2 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991)), *cert. denied*, 532 U.S. 909,
3 121 S.Ct. 1237, 149 L.Ed.2d 145 (2001).

4 Further, the statute provides that only if the motion, file, and
5 records "conclusively show that the movant is entitled to no relief"
6 may the Court summarily dismiss the Motion without sending it to the
7 United States Attorney for response. 28 U.S.C. § 2255. The Rules
8 regarding § 2255 proceedings similarly state that the Court may
9 summarily order dismissal of a § 2255 motion without service upon the
10 United States Attorney only "if it plainly appears from the face of
11 the motion and any annexed exhibits and the prior proceedings in the
12 case that the movant is not entitled to relief in the district court."
13 Rule 4(a), RULES-SECTION 2255 PROCEEDINGS. Thus, when a movant fails to
14 state a claim upon which relief can be granted or when the motion is
15 incredible or patently frivolous, the district court may summarily
16 dismiss the motion. *Cf. United States v. Burrows*, 872 F.2d 915, 917
17 (9th Cir. 1989); *Marrow v. United States*, 772 F.2d 525, 526 (9th Cir.
18 1985).

19
20 **A. GROUNDS ONE, TWO and THREE-INEFFECTIVE ASSISTANCE OF COUNSEL**

21 Mr. Martinez alleges that his attorney Chris Bugbee deprived him
22 of his constitutional right to effective assistance of counsel,
23 particularly during the plea stage and sentencing. In support of his
24 ineffective counsel claim, Mr. Martinez alleges three grounds:
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1 1) "Attorney Chris A. Bugbee never bothered to discuss the case
2 against me thoroughly. The Plea and the Consequences."

3 2) "Attorney Bugbee only threaten [sic] me that I had no other
4 choice, or I would face a 20 year sentence."

5 3) "Denial of effective assistance of Counsel."
6 Ct. Rec. 138, at 5.

7 Specifically, Mr. Martinez supports his allegations with the
8 following supporting facts: "I was not denying that I was Guilty, I
9 just thought that Defense counsel could do more for me. My State case
10 could have been argued that it did not qualify to be used to be used
11 [sic] as a prior against me. He did not want to listen to me, he kept
12 insisting for me to take the plea or get 20 years." Ct. Rec. 138, at
13 5. Petitioner further states: "He [his attorney] sent his associate
14 to see me and in court he stated that he did send his associate, but
15 that he never got to discuss the matter even with him, when was he
16 going to ever discuss it with me? Attorney Bugbee was not thorough
17 with his defense. He did not spend enough time with me discussing
18 [sic] the case." Finally Martinez states: "There were no arguments to
19 the PSI report. I was given points for a misdemeanor. During
20 sentencing attorney did imply that I really didn't know what I was
21 doing when I entered my plea. He stated that I really did not know
22 what I was doing."
23

24 Petitioner additionally attached a letter to motion in support of
25 ground 3, which explains that Petitioner believes he was sentenced
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1 "for being [m]erely an interpreter." Ct. Rec. 138, unnumbered
2 attachment.

3 After a careful review of the transcripts and file, the Court
4 rejects Mr. Martinez's arguments, and concludes that defense counsel's
5 performance was not deficient. There is no showing that counsel's
6 efforts were not those of a reasonably competent practitioner. He
7 points to no deficient performance by counsel which prejudiced his
8 case or deprived him of an opportunity to have a fair trial.

9 *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S.Ct. 2052, 2064,
10 80 L.Ed.2d 674 (1984). Likewise there is abundant evidence that
11 counsel talked at length with Martinez before and after entering his
12 plea of guilty. There is also evidence that Martinez understood what
13 the plea entailed and what counsel's recommendation would entail. The
14 following colloquy occurred at the hearing on Change of Plea before
15 the Honorable Fred Van Sickle:
16

17 THE COURT: All right. Have you had the opportunity to fully
18 discuss the charges against you in this case, and more
19 particularly focusing today on the allegations
20 involving Count 2, distribution of 50 grams or more of
21 actual methamphetamine, have you had a chance to review
the allegations in Count 2 and all the circumstances
and information surrounding that count with your
attorney, Mr. Bugbee?

22 DEFENDANT: Yes, I have.

23 THE COURT: And have you had adequate time to do that?

24 DEFENDANT: Yes.

25 THE COURT: Are you satisfied with your attorney?

26 DEFENDANT: Yes, I am.

1 THE COURT: Are you satisfied with the advice that you have been
2 provided?

3 DEFENDANT: Yes.

4 THE COURT: This plea agreement is somewhat different than others
5 because of the particular provision that it relates to
6 under the law and it is under the Rules of Criminal
7 Procedure. Let me explain what I mean. This plea
8 agreement provides that the United States will join
9 with you in recommending a term of imprisonment of 180
10 months if you comply with the provisions of this plea
11 agreement and that no other promises of any other type
12 have been made to you concerning what sentence the
13 court will impose, do you understand that?

14 DEFENDANT: Yes.

15 THE COURT: Now, the agreement provides that this plea becomes
16 binding on the court under the law and if the court
17 accepts the plea agreement, and that should your
18 sentence turn out to be less than 180 months, the
19 government would have the option of withdrawing from
20 this plea agreement and going forward with proceedings
21 against you, do you understand that?

22 DEFENDANT: Yes, I do, Your Honor.

23 Reporter's Transcript, Ct. Rec. 114, at pp. 7-8.

24 As to Martinez's statement that his attorney "threatened" him
25 into taking a plea of guilty, the transcript from the change of plea
26 hearing reveals a different story:

THE COURT: Mr. Martinez, has anyone threatened to harm you or harm
someone in your family or a close friend to force or
coerce or make you in any way plead guilty to any
crime?

DEFENDANT: No, Your Honor.

THE COURT: Whatever plea you choose to make today or enter, Mr.
Martinez, to the allegations in Count 2, whose decision
will it be to enter that plea?

DEFENDANT: My own, Your Honor.

1 THE COURT: And what is your plea then, Mr. Martinez, to the charge
2 in Count 2 of distribution of 50 grams or more of
3 actual methamphetamine, is that plea not guilty or
guilty, sir?

4 DEFENDANT: Guilty.

5 THE COURT: Mr. Bugbee, is this a knowing, intelligent and
6 voluntary plea?

7 MR. BUGBEE: Yes, Your Honor, I believe it is.
8 Ct. Rec. 114, Transcript of Hearing, at p. 26.

9 During the course of the change of plea hearing, Martinez was
10 asked on numerous occasions if he understood what was taking place and
11 being discussed. The judge explained the entire plea agreement to him
12 and asked if he understood it along the way. The response was always
13 in the affirmative, Ct. Rec. 114.

14 As to Martinez's ground that his attorney implies at sentencing
15 that he did not know what he was doing in entering his plea, Attorney
16 Bugbee submitted a "Supplemental Affidavit to Defendant's Motion to
17 Withdraw Guilty Plea," Ct. Rec. 82, clarifying that Martinez plea was
18 knowing and voluntary:

19 4. I reviewed the motion and memorandum today. On
20 page 4 of the memorandum I wrote, "[i]t was clear
21 to defense counsel at the time Mr. Martinez
22 entered his plea that he was uncertain and
confused."

23 5. The above language suggests that I thought that
24 Mr. Martinez's plea was not knowing in the sense
25 that he did not know what he was doing.
Additionally, it could be read to infer that his
plea was involuntary. I did not intend either of
these interpretations.

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1 6. At the time that Mr. Martinez entered his plea
2 there was no question in my mind that he knew what
3 he was doing and fully appreciated the
4 consequences of entering his plea. He understood
5 the significance of a Rule 11(c)(1)(C) plea
6 generally and as it would be specifically applied
7 to his case.

8 7. What I meant by the language set out on page 4 of
9 the memorandum was that he appeared to be scared
10 and uncertain of whether agreeing to a
11 recommendation of 15 years was the best decision
12 for him. I know that he was still debating in his
13 own mind whether he wanted to fight the
14 allegations and risk the imposition of a 20-year
15 minimum mandatory sentence.

16 Ct. Rec. 82, ¶¶ 4-7.

17 At the hearing in Defendant's Motion to Withdraw Guilty Plea,
18 defense counsel explained to the Court that Martinez fully understood
19 the plea and its consequences after counsel talked at length with him:

20 MR. BUGBEE: May it please the Court and Counsel: Your Honor, I
21 filed my motion and my supplemental affidavit. I did
22 recognize, after rereading the motion, it did kind of
23 imply that Mr. Martinez really didn't know what he was
24 doing when he entered his plea; and that was not the
25 case. There's no question in my mind that he understood
26 what the plea entailed and what the recommendation
 would entail. And I've had an opportunity since he
 entered that plea, and then as we approached the
 original sentencing date, and again, since then, to
 talk at length with Mr. Martinez. He understands what
 that plea entails, and he certainly understands that
 we're both constrained to request 15 years but that the
 Court has the ability to sentence Mr. Martinez to
 whatever it so chooses. And Mr. Martinez does
 recognize that if the Court imposes a sentence of less
 than 15 years, the result is going to be pretty much
 what he's asking the Court to do by his motion; and
 that is that -- one of two things -- either the
 government can go ahead and accept whatever the Court
 imposes, or the government could withdraw from this
 plea on its own, which would place Mr. Martinez in the
 position that he's asking the Court to put him in now.

1 And then, vice versa, he also understands that the
2 Court could impose more time on him. And he's well
3 aware of the fact that if the Court did impose more
4 than 15 years, he could at that time, by the wording of
5 the plea agreement, withdraw from the plea. So he
6 recognizes that.

7 Reporter's Transcript, Ct. 111 at pp. 4-5.

8 In summary, reviewing the transcripts and other papers filed in
9 this case, the Court appreciates that the Defendant was in a difficult
10 position with a difficult decision to make. However, his
11 circumstances did not amount to a constitutional violation of his 6th
12 Amendment right.

13 In addressing the issue of ineffective assistance of counsel, the
14 Court is guided by the now-familiar construct of *Strickland v.*
15 *Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), which
16 the petitioner acknowledges is the relevant standard. As required by
17 that analytical framework:

18 First, the defendant must show that counsel's
19 performance was deficient. This requires showing
20 that counsel made errors so serious that counsel
21 was not functioning as the "counsel" guaranteed
22 the defendant by the Sixth Amendment. Second, the
23 defendant must show that the deficient performance
24 prejudiced the defense. This requires showing that
25 counsel's errors were so serious as to deprive the
26 defendant of a fair trial, a trial whose result is
reliable.

Id. at 687.

27 Establishing these two elements is not easy: "the cases in which
28 habeas petitioners can properly prevail on the ground of ineffective
29 assistance of counsel are few and far between." *Waters v. Thomas*, 46

1 F.3d 1506, 1511 (11th Cir. 1995) (*en banc*) (*quoting Rogers v. Zant*, 13
2 F.3d 384, 386 (11th Cir. 1994)).

3 In *Groseclose v. Bell*, 130 F.3d 1161, 1167 (6th Cir. 1997),
4 discussing the first prong of the *Strickland* analysis, the Sixth
5 Circuit recognized:

6 The [Supreme] Court cautioned that in undertaking
7 an ineffective-assistance review, "[j]udicial
8 scrutiny of counsel's performance must be highly
9 deferential," and must avoid the "second-guess[ing
10 of] counsel's assistance . . . , [as] it is all too
11 easy for a court, examining counsel's defense
12 after it has proved unsuccessful, to conclude that
13 a particular act or omission of counsel was
14 unreasonable." *Strickland*, 466 U.S. at 689. In
15 order to avoid "the distorting effects of
hindsight," a reviewing "court must indulge a
strong presumption that counsel's conduct falls
within the wide range of reasonable professional
assistance; that is, the defendant must overcome
the presumption that . . . the challenged action
'might be considered sound trial strategy.'" ' *Id.*
(citation omitted).

16 Furthermore, in evaluating the prejudice suffered by a petitioner
17 as a result of alleged ineffective assistance of counsel, "[i]t is not
18 enough for the defendant to show that the errors had some conceivable
19 effect on the outcome of the proceeding." *Strickland*, 466 U.S. at 693.
20 Indeed, "[v]irtually every act or omission of counsel would meet that
21 test, and not every error that conceivably could have influenced the
22 outcome undermines the reliability of the result of the proceeding."
23 *Id.* (citation omitted). Rather, the petitioner "must show that there
24 is a reasonable probability that, but for counsel's unprofessional
25 errors, the result of the proceeding would have been different. A
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1 reasonable probability is a probability sufficient to undermine
2 confidence in the outcome." *Id.* at 694.

3 Finally, in conducting this inquiry, we need not apply
4 *Strickland's* principles in a mechanical fashion. As the Supreme
5 Court explained:

6 [A] court need not determine whether counsel's
7 performance was deficient before examining the
8 prejudice suffered by the defendant as a result of
9 the alleged deficiencies. The object of an
10 ineffectiveness claim is not to grade counsel's
11 performance. If it is easier to dispose of an
ineffectiveness claim on the ground of lack of
sufficient prejudice, which we expect will often
be so, that course should be followed.

12 *Id.* at 697.

13 The Court begins its review by either determining whether
14 counsel's performance was deficient, or by determining any possible
15 prejudice suffered by Mr. Martinez. In either event, the result in
16 this case is identical.

17 Further, at the change of plea hearing, Mr. Martinez indicated
18 that Mr. Bugbee had explained the plea agreement to him and he
19 understood the agreement, which undermines his claim that he was
20 threatened into accepting only one choice: a guilty plea. Mr.
21 Martinez also confirmed his satisfaction with his attorney's
22 representation.

23 In fact, it appears that Mr. Martinez was fully satisfied with
24 the services from Mr. Bugbee. The record additionally contains no
25 evidence that Mr. Martinez's attorney breached his ethical duty or
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1 other duties in representing the Petitioner. Mr. Martinez also had
2 every opportunity to speak directly to the Court as to matters that he
3 wanted taken into account in withdrawing his plea and in sentencing.
4 Reporter's Transcript, Ct. Rec. 111, at 6; Ct. Rec. 89.

5 Finally, there is no indication that Mr. Martinez was prejudiced,
6 i.e., that he would have received a lesser sentence than 180 months,
7 the sentence he received was below the 20 year minimum which he would
8 in all likelihood have faced if he went to trial and were found
9 guilty. Even assuming arguendo deficient performance by defense
10 counsel, Petitioner has not shown prejudice. Under the prejudice prong
11 of the inquiry, Petitioner "must affirmatively prove prejudice by
12 showing that counsel's errors actually had an adverse effect on the
13 defense." *United States v. Freixas*, 332 F.3d 1314, 1320 (11th
14 Cir.2003). This showing requires "more than some conceivable effect
15 on the outcome of the proceeding." *Id.* Here, Petitioner has not shown
16 that a reasonable probability exists that the outcome of the case
17 would have been different if his attorney had given the assistance
18 that Petitioner has alleged he should have provided. This
19 ineffectiveness claim is without merit. The Court finds that the
20 Petitioner has not provided any evidence to convince this Court that
21 his constitutional rights were violated.
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23 The Petitioner is not entitled to an evidentiary hearing on the
24 motion to vacate his sentence under 28 U.S.C. § 2255. Additionally,
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1 the Court summarily dismisses the Motion without sending it to the
2 United States Attorney for response. Accordingly,

3 **IT IS ORDERED** that:

4 1. Mr. Martinez's Motion to Vacate, Set Aside, or Correct
5 Sentence by a Person in Federal Custody, filed September 21, 2007 (**Ct.**
6 **Rec. 138**, CR-04-0138-LRS; **Ct. Rec. 1**, CV-07-0300-LRS) is **DENIED**.

7 2. The District Court Executive is directed to:

8 (a) File this Order;

9 (b) Provide a copy to Petitioner **AND TO** the United States
10 Attorney, Spokane, Washington; and

11 (c) **CLOSE THESE FILES**.

12 **DATED** this 25th day of October, 2007.

13 **s/Lonny R. Suko**

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15 _____
16 LONNY R. SUKO
17 UNITED STATES DISTRICT JUDGE
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